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## **A SUPREME MATTER OF CONSCIENCE: LADY HALE'S ENGAGEMENT WITH ARTICLE 9 ECHR**

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### **Abstract**

This article will consider the engagement of the United Kingdom Supreme Court in determining the application of Article 9(1) European Convention of Human Rights (ECHR) freedom of conscience in two leading case decisions: *Lee v Ashers Baking Company Ltd* 2018<sup>2</sup> and *Greater Glasgow Health Board v Doogan* 2014.<sup>3</sup> Lady Hale's lead opinions in these cases will be analysed. This will demonstrate important developments in both equality law and freedom of conscience. In particular, through this examination it will be shown that freedom of conscience under Article 9(1) European Convention of Human Rights has been strengthened.

### **Introduction**

The cases of *Lee v Ashers Baking Company Ltd* 2018<sup>4</sup> and *Greater Glasgow Health Board v Doogan* 2014<sup>5</sup> are recent influential equality law cases with lead opinions given by Lady Hale. There were no dissenting opinions given in either case. These cases have been chosen because they are leading cases focusing upon freedom of conscience under Article 9 ECHR. Discussion will first focus on the concept of conscience drawing upon the thoughts and views of the psychoanalyst Sigmund Freud. The paper will then examine the cases highlighted above. As such, the concept of conscience is considered earlier in the article to show how freedom of conscience is later strengthened through Lady Hale's engagement with Article 9.

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<sup>2</sup> *Lee v Ashers Baking Company Ltd* [2018] UKSC 49.

<sup>3</sup> *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.

<sup>4</sup> *Lee v Ashers Baking Company Ltd* [2018] UKSC 49.

<sup>5</sup> *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.

## 1 Conscience

Conscience is an elusive and intangible concept. Discussion of conscience in moral philosophy and jurisprudence has become quite rare because conscience is seen to be difficult to discuss.<sup>6</sup> Despite there being many different theories about what conscience actually means and how it is defined,<sup>7</sup> I identify that the concept of conscience is explicitly connected with belief and non-belief. For instance, conscience is frequently engaged in contemporary human rights discourse. There is an understanding of conscience and religion set down in Article 9 ECHR: 'Freedom of Thought, Conscience and Religion.' This right is of fundamental importance because acting against conscience is *prima facie* discriminatory, falling within the ambit of Articles 9 and 14 (Freedom from Discrimination).

There is a problem created by considering freedom of conscience only in relation to religion. Such an approach creates difficulties assessing a full, developed understanding surrounding the concept of conscience. This article does not adopt such an approach. Considering only freedom of religious conscience invites criticism for two reasons. First, this approach can be criticised because it portrays a 'limiting individualistic tendency'.<sup>8</sup> The tendency in this complaint comes about by regarding freedom of conscience as primarily a matter of religious liberty and *vice versa*.<sup>9</sup> The concept of conscience is limited to the individual exercising religion in the state, such as an individual being allowed to attend Friday prayers within a Muslim country and so does not consider the role of the wider religious body. It does not consider collective rights. In considering solely freedom of religious conscience the role played by collective religious conscience can be ignored by the state in favour of the individual. Second, considering freedom of religious conscience does not further clearly acknowledge that every individual of sound mind has a developed conscience impacting upon both their objective and subjective decisions.<sup>10</sup> References to freedom of religious conscience, for example, ignore the fact that conscience is not only a

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<sup>6</sup> Lyons W., 'Conscience – An Essay in Moral Psychology' (2009) 84 *Philosophy*, 477.

<sup>7</sup> For instance, see Sorabji R., *Moral Conscience Through the Ages: Fifth Century BCE to the Present* (2014, OUP) 215.

<sup>8</sup> McCrea R., 'Book review: J Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010)' (2011) 74(4) *MLR* 631, 665.

<sup>9</sup> Rivers J., *The Law of Organized Religions: Between Establishment and Secularism* (2010, OUP) 30.

<sup>10</sup> *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [79]-[80] per Fourth Section.

religious concept.<sup>11</sup> Conscience is a subtle concept – freedom of conscience is not only confined to religion and is open to wider influences.

For instance, it has been argued by Hudson that there is an objective sense of conscience. An ‘objectively constituted conscience’<sup>12</sup> was recognised by the Roman Catholic theologian Cardinal Newman as acknowledging that Roman Catholics receive religious teaching given plentifully to them, which then impacts their attitudes and holds them to account throughout life.<sup>13</sup> The basis for freedom of conscience can be seen in a concern for human flourishing: ‘[Cardinal Newman] locates the foundation of honourable freedoms in a concern for human excellence and human flourishing.’<sup>14</sup> It is clear that when talking about conscience, Cardinal Newman states that ‘conscience is...a stern monitor.’<sup>15</sup> Therefore, conscience is a guiding force, like a pair of braces straightening an individual’s teeth. Although this understanding of conscience can govern religion, it is not reliant upon considering freedom of conscience solely relating to freedom of religious conscience.

The legal philosopher Robert George has contrasted this ‘objective conscience’ with a subjective, autonomous notion of conscience which is termed ‘conscience as “self-will” [which] is a matter of feeling or emotion’.<sup>16</sup> Here conscience is relegated to feelings and emotions. This contrast is useful because it highlights different approaches that have been taken towards the concept of conscience.

It is also evident that outside, external influences can further impact on the conscience. For example, individual obligation can particularly impact conscience. This is because conscience is ‘a right to do what one judges oneself to be under an obligation to do, whether one welcomes the obligation or must overcome strong aversion to fulfil it.’<sup>17</sup> Obligation is a powerful motivating force. To elaborate on this, as George points out, it is why individuals compelled by their religious teaching may be forced to carry out duties or follow mandated teachings even if they do not want to follow them.<sup>18</sup> Religious liberty can involve demands put upon followers that may require them to abstain from or follow certain actions, sometimes even against their own will. External influences

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<sup>11</sup> See Sorabji, *Moral Conscience Through the Ages*, 201.

<sup>12</sup> Hudson A., ‘Conscience as the Organising Concept of Equity’ (2016) 2(1) *CJCCL* 261, 279.

<sup>13</sup> Hudson A., *Principles of Equity and Trusts* (2016, Routledge) 11-12. See generally – Newman J H, *Certain Difficulties Felt By Anglicans Considered...A Letter to the Duke of Norfolk* (1897, Longmans).

<sup>14</sup> George R P, *Conscience and its Enemies: Confronting the Dogmas of Liberal Secularism* (2013, ISI books) 110.

<sup>15</sup> *Ibid* 112.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid* 112-113.

<sup>18</sup> *Ibid*.

can further extend to educational influences and also influence brought about by an individual's peer group. Freedom of conscience is not solely dependent upon a subjective notion of conscience. This allows for outside, wider influence.

## **2 Freud and conscience**

This line of thought can be developed by engaging with the work of the psychoanalyst Sigmund Freud. It has been suggested by Hudson that there is an objective psychological sense of conscience.<sup>19</sup> This flows from a mixture of objective ideas implanted into the mind.<sup>20</sup> Such an understanding of conscience as an objectively formed phenomenon derives from Freud's work in psychoanalysis. Freud sets out the relationship between the super-ego and conscience in *The Question of Lay Analysis*: 'you will already have guessed that that the super-ego is the vehicle of the phenomenon that we call conscience.'<sup>21</sup> Building upon the interrelation between the id/ego/super-ego,<sup>22</sup> his psychoanalysis of the mind led to Freud coming to detail the creation of conscience as a psychological phenomenon.<sup>23</sup> A strict role for the conscience is given that limits individual subjective decision making.

The conscience is a guiding force that provides a controlling influence upon the individual. Such a view holds that outside messages control the conscious mind. It does not depend upon whether this direction is subjectively welcomed by the individual. This is important in the context of analysing freedom of conscience, as has been demonstrated in the relevant case law that shows how protection of conscience has been strengthened.

### ***Greater Glasgow Health Board v Doogan***

The Supreme Court considered freedom of religious conscience in *Greater Glasgow Health Board v Doogan* 2014.<sup>24</sup> This case highlights an instance where equality law interacts with freedom of conscience. Miss Doogan and Mrs Wood were practising Roman Catholics who both worked at South General Hospital, Glasgow as Labour

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<sup>19</sup> Hudson, 'Conscience', 276.

<sup>20</sup> Ibid.

<sup>21</sup> Freud S., *The Question of Lay Analysis* (1926, Internationaler Psychoanalytischer Verlag) 17. See further, Jones E., *The Life and Work of Sigmund Freud* (1964, Pelican) 596; Kline P., *Psychology and Freudian Theory: An Introduction* (1984, Routledge) 18; Dilman I., *Freud, Insight and Change* (1988, Basil Blackwell Ltd) 199.

<sup>22</sup> Freud S., *The Ego and the Id* (1923, Internationaler Psychoanalytischer Verlag) 30, 477.

<sup>23</sup> Hudson, 'Conscience', 277. See Freud, *The Question of Lay Analysis*, 41; Freud S., *Civilisation and its Discontents* (1930, Penguin) 77; Freud S., *New Introductory Lectures on Psychoanalysis* (first published 1933, 1962, J Strachey tr, Penguin) 91-94.

<sup>24</sup> *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.

Ward Co-ordinators but objected to having any involvement in the process of abortion. Although this case originated in Scotland, the relevant legislation (section 217 Equality Act 2010) is the same in Scotland as in England and Wales. This is an indication of the scope of the Abortion Act 1967 and the Equality Act 2010. Section 4 Abortion Act 1967 was considered because the Supreme Court examined the right to conscientious objection to abortion.

Section 4(1) states:

(1) Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection: Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.

The conscience clause in s4(1) was identified as key to determining the scope of the right of conscientious objection,<sup>25</sup> in particular the phrase 'to participate in', which protects an individual from participating in an abortion. As such, the question was one of pure statutory construction.<sup>26</sup>

Lady Hale's analysis followed Lord Diplock's judgment in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* 1981<sup>27</sup> in deciding that the Abortion Act 1967 authorised the whole course of treatment bringing about the abortion.<sup>28</sup> Lady Hale agreed with Lord Diplock's purposive approach that the clear policy brought about by the wording in the Abortion Act 1967 was to, 'broaden the grounds upon which an abortion might lawfully be obtained and to ensure that abortion was carried out with all proper skill and in hygienic conditions.'<sup>29</sup> The point for impact on freedom of conscience and equality law is that Lady Hale's statutory construction then built upon this by adopting a narrow meaning in relation to participating in the course of treatment, for the purposes of the conscience clause under s4 Abortion Act 1967.<sup>30</sup> This was because, in drafting the conscience clause, it was unlikely that, 'Parliament had in mind the host of ancillary, administrative and managerial tasks'.<sup>31</sup> Here Lady Hale ascribed a narrow meaning for the purposes of conscientious

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<sup>25</sup> *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [10]-[11] per Lady Hale.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800.

<sup>28</sup> *Greater Glasgow Health Board v Doogan* [33] per Lady Hale. See *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 [828A] per Lord Diplock.

<sup>29</sup> *Greater Glasgow Health Board v Doogan* [27] per Lady Hale. See *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [827D] per Lord Diplock.

<sup>30</sup> *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [37-38] per Lady Hale.

<sup>31</sup> *Ibid.*

objection. As an example, it was held that participation ‘means taking part in a “hands-on” capacity.’<sup>32</sup> Lady Hale interpreted the intention of Parliament to authorise the whole course of treatment in a narrow way that excluded from the conscience clause ancillary, administrative and supervisory tasks.

By holding this narrow meaning, these arguments then led to the statutory interpretation being applied to a number of hypothetical scenarios. Here Lady Hale practically applied the Abortion Act 1967 to the context of particular roles and situations faced in the workplace by midwives.<sup>33</sup> An example of this is Lady Hale applied the conscience clause to the job description of the Labour Ward Co-ordinator,<sup>34</sup> in order to decide whether the particular examples satisfied her interpretation of the statutory wording. This found the conscience clause to be narrower than the scope put forward by the midwives. The whole course of treatment included work activity not included in the narrow conscience clause.<sup>35</sup> As such, the nurses’ complete job description was not covered by the conscience clause; the nurses were required to perform services that infringed their religious conscience but which were not covered by the statutory conscience clause.

Freedom of thought, conscience and religion in relation to equality law was raised in the judgment.<sup>36</sup> In deciding that the case concerned solely statutory construction, Lady Hale considered (and dismissed) important arguments that involve freedom of religion and equality law.<sup>37</sup> Lady Hale considered that any argument made under the Equality Act 2010 should be made under a different forum. *Doogan* was held to resolve issues involving statutory interpretation; *Doogan* was not the correct setting to resolve matters of indirect discrimination under the Equality Act 2010.

The second argument alluded to by the Supreme Court questioned whether there was a need to apply a proportionality test to decide about limiting manifestation of belief following *Eweida and Others v United Kingdom* 2013.<sup>38</sup> This is important because

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid* [39] per Lady Hale.

<sup>34</sup> Henderson A., ‘Conscientious objection to abortion: Catholic Midwives lose in the Supreme Court’ <https://ukhumanrightsblog.com/2014/12/28/conscientious-objection-to-abortion-catholic-midwives-lose-in-supreme-court/> 18 September 2018.

<sup>35</sup> *Greater Glasgow Health Board v Doogan* [39]-[40] per Lady Hale. See further Hale B., ‘Secular Judges and Christian Law’ (2015) 17(2) *Ecc. L.J.* 170, at 177.

<sup>36</sup> *Greater Glasgow Health Board v Doogan* [24] per Lady Hale.

<sup>37</sup> *Ibid* [22].

<sup>38</sup> *Eweida and Others v The United Kingdom* (2013) (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10). This leading case for religious liberty and article 9 held that Ms Eweida, a British Airways employee, was successful in her claim of discrimination against her employer who breached her right to manifest religion in the workplace by not allowing Ms Eweida wearing a cross. This was held to be contrary to Article 9 ECHR. The European Court

although the case was not explicitly analysed in these terms, the fact that Lady Hale cites *Eweida* and suggests ‘refusing for religious reasons to perform some of the duties of the job is likely...to be held to be a manifestation of a religious belief’<sup>39</sup> frames the rest of the debate in *Doogan*. The manifestation of belief under Article 9(1) ECHR was here considered to be the nurses’ conscious objection to performing services directly connected to abortions<sup>40</sup> and this invoked mention about indirect discrimination under the Equality Act 2010.<sup>41</sup> A judgment surrounding the issue of discrimination under equality law was not given. Lady Hale considered this to involve ‘difficult questions’<sup>42</sup> because this would involve proportionality analysis under Article 9(2) and so invoke whether restrictions placed upon the manifestation by the employers was a proportionate means of achieving a legitimate aim.<sup>43</sup> This was held not to be helpful because the answers would not assist in the preferred approach (statutory analysis) adopted by Lady Hale.<sup>44</sup> The answers would not necessarily point to ‘either a wide or a narrow reading of section 4 of the 1967 Act.’<sup>45</sup> For this reason the answers were deemed ‘context specific’.<sup>46</sup> Instead, Lady Hale found it helpful to set a clear limit set down from the employer to the employee and instead clearly adopted the ‘ordinary principles of statutory construction.’<sup>47</sup> This was because this would ‘set a limit to what an employer may lawfully require of his employees.’<sup>48</sup> I suggest that in this respect the opinion was admirable because taking this approach helpfully provides clear guidance involving conscience exemptions to both hospitals and midwives. As a result of the case there are clearer guidelines given for the scope of conscientious objection under the Abortion Act 1967.

By considering manifestation of religion in *Doogan*, it is clear that Lady Hale rejected balancing the need to provide abortion services with midwives’ religious conscience. It

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of Human Rights (ECtHR) held that by denying Ms Eweida her right to wear a cross, domestic law did not strike the right balance between the protection of Ms Eweida’s right to manifest her religious and the rights of others – Ibid [79]. The ECtHR determined that the domestic courts had given too much weight to BA’s wish to protect its corporate image – Ibid [112]-[114].

<sup>39</sup> *Greater Glasgow Health Board v Doogan* [23] per Lady Hale.

<sup>40</sup> Ibid. See further, J Kentridge, ‘Case Comment: *Greater Glasgow Health Board v Doogan & Anor* [2014] UKSC 68’ <http://uksblog.com/case-comment-greater-glasgow-health-board-v-doogan-anor-2014-uksc-68/> 15 September 2017.

<sup>41</sup> *Greater Glasgow Health Board v Doogan* [23]-[24] per Lady Hale.

<sup>42</sup> Ibid [23].

<sup>43</sup> Ibid.

<sup>44</sup> Kentridge, ‘Case Comment: *Greater Glasgow Health Board v Doogan & Anor* [2014] UKSC 68’.

<sup>45</sup> *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [23] per Lady Hale.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid [24].

<sup>48</sup> Ibid.



is nevertheless clear that balancing the interests of society with those of religious individuals, involves weighing (and potentially restricting) rights. For example in *Doogan*, the Supreme Court considered that refusal to perform abortion services for religious reasons was likely to be held to be a manifestation of belief,<sup>49</sup> and for the reasons given above rejected the need to employ the proportionality analysis to question whether the restriction of a religious right was a proportionate means of achieving the legitimate aim to provide hospital services in accordance with Article 9(2).<sup>50</sup> The need for a clear limit providing guidance for conscientious objection, in the provision of abortion services, was met. There was not, however, an answer given for the restriction upon manifestation of belief.

On the other hand, it is submitted that the statutory construction approach by the Supreme Court (providing guidance) potentially decides the question in an illogical manner. Just because arguably a valid legal test does not help the preferred mode of legal analysis, this does not mean that this test should be abandoned. The proportionality analysis was a perfectly valid option open to the Supreme Court. A preferable approach is that when the Supreme Court is invited to interpret a rule affecting a fundamental right, they should do so against the background of the underlying balance of principles. In other words, to properly interpret s4(1) Abortion Act 1967 requires the court to consider what limitations of freedom of conscience are justified. The underlying balance of principles was the same and equally relevant both in the statutory interpretation rule and any other question of indirect discrimination. As such, following the use of the proportionality analysis in *Eweida*,<sup>51</sup> proportionality under Article 9(2) ECHR was highly relevant and would have addressed the issue of manifestation of individual conscience and belief here. Richard Ekins, for instance, has termed it 'extraordinary' that that the Supreme Court did not reflect on Article 9 ECHR.<sup>52</sup> Therefore the Supreme Court should not dispense with a valid legal option merely because an easier option (in the form of statutory interpretation/construction) presents itself. It is arguable that if the Supreme Court had considered what limitations of freedom of conscience are justified, then the decision may have been more favourable to the nurses' conscience. There was a missed opportunity to invoke the proportionality analysis under Article 9(2) ECHR and so a corresponding opportunity

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<sup>49</sup> *Ibid* [23].

<sup>50</sup> Kentridge, 'Case Comment: *Greater Glasgow Health Board v Doogan & Anor* [2014] UKSC 68'.

<sup>51</sup> *Eweida and Others v The United Kingdom* [2013] (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) [83]-[84], [100]-[101], [104]-[106].

<sup>52</sup> Ekins R., 'Abortion, Conscience and Interpretation - Case Comment: *Greater Glasgow Health Board v Doogan* [2014] UKSC 68' (2016) 132 *LQR* 6, 11.

to (potentially) allow for more protection to be given to individual conscience. It was a missed opportunity to strengthen manifestation for individual conscience.

Alastair Henderson argues that the ruling in *Doogan* clarifies that the law requires employers to respect the conscience of their employees, to the extent that they do not need to directly participate in abortion.<sup>53</sup> He identifies that this is a narrow victory for freedom of conscience – it is one that recognises a limited respect for freedom of conscience. Such a level of respect is welcome in hospitals. As Henderson points out this is also for the sake of women undergoing an abortion procedure, because they may rather not be treated by someone who strongly disagrees with what is happening.<sup>54</sup> The problem with the decision in *Doogan*, however, is that there was an opportunity for strengthening freedom of conscience and this was missed: the proportionality of the restriction on the manifestation of the midwives' beliefs was not debated. This suggests that rather than respecting conscience, *Doogan* was a missed opportunity. The Supreme Court instead 'undercut the provision that Parliament made to protect conscience.'<sup>55</sup> The missed opportunity here to protect manifestation of conscience highlights a limitation placed upon freedom of conscience. This now requires attention to be given to a later case - *Lee v Ashers Baking Company Ltd* 2018.<sup>56</sup>

### ***Lee v Ashers Baking Company Ltd***

In *Lee v Ashers Baking Company Ltd* 2018<sup>57</sup> the right of a bakery and its owners to freedom of religion and freedom of expression under Articles 9 and 10 ECHR were considered.<sup>58</sup> Ashers Baking Company Ltd in Northern Ireland refused to supply a cake iced with the message 'support gay marriage' for Mr Lee. The bakers informed Mr Lee that his order could not be fulfilled and Mr Lee was given an apology and full refund.<sup>59</sup> The reason given for the refusal was that the message was not endorsed by the bakery owners.<sup>60</sup> The question arose as to whether this was unlawful associative direct discrimination.<sup>61</sup>

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<sup>53</sup> Henderson, 'Conscientious objection to abortion: Catholic Midwives lose in the Supreme Court'.

<sup>54</sup> *Ibid.*

<sup>55</sup> Ekins, 'Abortion, Conscience and Interpretation', 11.

<sup>56</sup> *Lee v Ashers Baking Company Ltd* [2018] UKSC 49.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid* [1] per Lady Hale.

<sup>59</sup> *Ibid* [12].

<sup>60</sup> *Ibid* [1].

<sup>61</sup> *Ibid.*

Lady Hale recognised that there were very important questions raised by this appeal which were ‘undoubtedly of general public importance, not only in Northern Ireland but also in the rest of the United Kingdom.’<sup>62</sup> The Court of Appeal had found that the refusal to bake the cake was direct discrimination on grounds of sexual orientation contrary to the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006. The provision of services here raises issues at the heart of equality law.<sup>63</sup>

This is a contentious decision because it was a unanimous decision given by five justices. There were no dissenting opinions given in the Supreme Court sitting for the first time in Northern Ireland. The court found that the bakery could not refuse to provide a cake to Mr Lee because he was gay or because he supported gay marriage.<sup>64</sup> This would be a form of discrimination. As such, it is clear that this is not a case based on sexual orientation.<sup>65</sup> The law surrounding direct discrimination on grounds of sexual orientation was not changed.

It is also to be considered a contentious decision because, in Lady Hale’s view, the bakery would be entitled to refuse to do whatever the message conveyed by the icing on the cake.<sup>66</sup> Whether the message was support for a political party or support for a particular religious denomination, in Lady Hale’s view the bakery would be permitted not to provide such a service.<sup>67</sup> Lady Hale is clear that the ‘objection was to the message and not to any particular person or persons.’<sup>68</sup> In an opinion supported by Peter Tatchell,<sup>69</sup> Lady Hale evidently found this not to be a case centred upon discrimination. The bakery would be entitled to refuse to provide a variety of messages.

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<sup>62</sup> Ibid [7].

<sup>63</sup> See further cases relating to the provision of services - *Islington v Ladele* [2008] UKEAT 0453\_08\_1912; *Ladele v London Borough of Islington* [2009] EWCA Civ 1357; *Lautsi v Italy* (2010) 50 E.H.R.R. 42; *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880; *Eweida v British Airways PLC* [2010] EWCA Civ 80; *Black & Anor v Wilkinson* [2013] EWCA Civ 820; *Mba v Mayor* [2013] EWCA Civ 1562; *Eweida v United Kingdom* [2013] ECHR 37; *Bull v Hall* [2013] UKSC 73; *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77.

<sup>64</sup> *Lee v Ashers Baking Company Ltd* [2018] UKSC 49 [55] per Lady Hale.

<sup>65</sup> The court did not reference the leading case of *Bull v Hall* [2013] UKSC 73 in which direct discrimination on the ground of sexual orientation was found in the refusal to offer a homosexual couple a double room in a hotel. The Appellants had argued there was no direct discrimination and that even if their treatment of guests amounted to indirect discrimination, this was justified on the basis of their religion. It was held that if direct discrimination was not found then all the justices agreed that the refusal to provide services was indirectly discriminatory and unjustified.

<sup>66</sup> *Lee v Ashers Baking Company Ltd* [2018] UKSC 49 [55] per Lady Hale.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid [34] per Lady Hale.

<sup>69</sup> Tatchell P., ‘I’ve changed my mind on the gay cake row. Here’s why.’ <https://www.theguardian.com/commentisfree/2016/feb/01/gay-cake-row-i-changed-my-mind-ashers-bakery-freedom-of-conscience-religion> 30 October 2018.

Had the case not found for freedom of conscience, Lady Hale concedes that this would oblige the bakery, 'to supply a cake iced with a message with which they profoundly disagreed.'<sup>70</sup> No obligation was imposed to provide a service with a message that conflicted with the baker's beliefs. Obliging a person to manifest a belief which they do not hold is a limitation on article 9(1) rights to freedom of thought, conscience and religion.<sup>71</sup> As such, by upholding freedom of conscience, the level of freedom put forward may give more credit and substance to the role of conscience. It strengthens individual (and collective) conscience by not requiring individuals to act against protected conscience.

Some discussion is given by Lady Hale to Article 9: 'the Convention rights to freedom of thought, conscience and religion ... are clearly engaged by this case.'<sup>72</sup> The case has ramifications for freedom of conscience. The case found freedom of conscience to be broader than the scope put forward by Mr Lee. Article 9 entails the courts paying 'respect to individual's...religious principles'<sup>73</sup> and so finding for the appellants under Article 9 by not requiring them to endorse the iced message, this case develops the law surrounding freedom of thought, conscience and religion.

Further focus was given by Lady Hale to Article 9 in relation to Article 10 (Freedom of Expression). Lady Hale makes clear under Article 9 that 'one is free both to believe and not to believe.'<sup>74</sup> This is also developed by the fact that the 'freedom not to be obligated to hold or to manifest beliefs that one does not hold is also protected by Article 10 of the Convention.'<sup>75</sup> This develops the interconnected position between Article 9 and Article 10 and goes some way to explaining the position taken by Lady Hale. It is evident that discussion surrounding freedom of conscience is here given alongside freedom of expression.<sup>76</sup> As highlighted above Lady Hale is clear that the 'objection was to the message and not to any particular person or persons.'<sup>77</sup> Freedom of expression holds that one must not be required to provide a service that conflicts with their conscience. The bakery were free not to express the iced message on the cake.

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<sup>70</sup> *Lee v Ashers Baking Company Ltd* [2018] UKSC 49 [55] per Lady Hale.

<sup>71</sup> *Buscarini v San Marino* (1999) 30 EHRR 208; *Commodore of the Royal Bahamas Defence Force v Laramore* [2017] 1 WLR 2752. See Pearson M., 'Article 9 at a Crossroads: Interference Before and After *Eweida*' (2013) *HRLR* 1, 22.

<sup>72</sup> *Lee v Ashers Baking Company Ltd* [2018] UKSC 49 [49] per Lady Hale.

<sup>73</sup> Munby J., 'Law, Morality and Religion in the Family Courts' (2014) *Ecc. L.J.* 131, at 137.

<sup>74</sup> *Lee v Ashers Baking Company Ltd* [2018] UKSC 49 [49] per Lady Hale.

<sup>75</sup> *Ibid* [52].

<sup>76</sup> In a U.S. context see *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* (2018) U.S. 584.

<sup>77</sup> *Ibid* [34].

By engaging freedom of conscience it is clear that *Ashers* may have righted the earlier wrong put forward in *Doogan*. Whereas in *Doogan* the limitation imposed upon individual conscience was not measured proportionately, in *Ashers* freedom of conscience was promoted and protected by allowing individuals not to act against their conscience. Freedom of conscience is strengthened – individuals are not required to provide services that require them to turn against their legally protected conscience.

## **Conclusion**

The earlier missed opportunity to strengthen freedom of conscience in *Doogan* was taken by Lady Hale in *Ashers*. *Ashers* does not insert a conscience clause into equalities legislation,<sup>78</sup> but it does develop arguments made for freedom of conscience and by doing so it significantly strengthens the right to freedom of conscience.

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<sup>78</sup> Such as that discussed earlier for conscientious objectors under the Abortion Act 1967.